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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 533

TORAO TAKAHASHI,
Petitioner,

vs.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman thereof, W. B. WILLIAMS, HARVEY E. HASTAIN, and WILLIAM SILVA, as members thereof,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRIVAT-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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The State of California presents herewith its brief in opposition to the petition of Torao Takahashi for writ of certiorari to the Supreme Court of the State of California, which petition seeks to review the judgment and decision reported in 30 Advance California Reports, 723, 185 Pac. (2d) 805.

STATEMENT OF THE CASE.

This case involves primarily the constitutionality of that portion of section 990 of the Fish and Game Code of California which precludes *all* persons ineligible to citizenship of the United States from obtaining commercial fishing licenses. The petitioner, Torao Takahashi, filed a petition in the Superior Court of the State of California for a writ of mandate to compel the Fish and Game Commission of this State and its members to issue such a license to him. (R. 1-2.) Certain parts of the petition were struck on motion (R. 5-6) but that action of the trial Court is not material to the discussion here. In substance the petition alleges that Mr. Takahashi was born in Japan; that he has been refused a commercial fishing license "solely because of his Japanese ancestry and solely because of the provisions of Section 990 of the Fish and Game Code" (R. 2), and that the section is unconstitutional on its face "because enacted for the purpose and administered in a manner to discriminate against persons, including the petitioner, solely because of his race." (R. 2.)

By their answer, the Fish and Game Commission and the Commissioners deny they refused to issue a commercial fishing license to Mr. Takahashi solely because of his Japanese ancestry. (R. 3.) They allege on information and belief that Mr. Takahashi is ineligible to citizenship of the United States and consequently they are not authorized by statute to issue a license to him. (R. 3.) They deny that section 990 is unconstitutional because, as Mr. Takahashi has

alleged, it is "enacted for the purpose and administered in a manner to discriminate against persons, including the petitioner, solely because of his race." (R. 3-4.) Respondents further deny that the code section does not afford due process and equal protection of the law. (R. 3-4.)

When the matter came on for hearing in the trial Court Mr. Takahashi reached the conclusion, apparently, that his fishing activities since 1915 had been confined solely to the high seas. For he voluntarily amended his petition by changing the nature of his occupation to that of "commercial fishing on the high seas". (R. 6.) At the same time he amended the prayer of his petition by asking for a commercial fishing license "to engage in commercial fishing on the high seas". (R. 6.)

The proceeding was heard by the trial Court on the petition, as thus amended, and on the answer. No evidence was offered or received and Mr. Takahashi did not countervail the answer by proof, either in direct denial or by way of avoidance.

In rendering its original judgment the trial Court found that Mr. Takahashi is ineligible to citizenship, but nonetheless is qualified to have issued to him a commercial fishing license under said section 990 "authorizing him to bring ashore in California, for the purpose of selling in a fresh state, his catches of fish from the waters of the high seas beyond the State's territorial jurisdiction". (R. 7.) On this finding it was adjudged that a writ of mandate issue compelling

the Commission to issue a commercial fishing license as thus specified. (R. 7.)

The Commission appealed on July 2, 1946. (R. 8.) The transcript was filed in the reviewing Court on July 22, 1946. Seven days later the trial Court, on the ex parte application of Mr. Takahashi, made and entered an *amended judgment* commanding the Commission to issue to him a commercial fishing license. (R. 21.) Under the terms of the *amended judgment* the license is not qualified as to place of use as was done in the original judgment. Hence the license, if issued pursuant to the amended judgment, would permit Mr. Takahashi to fish commercially *in territorial waters of California* as well as on the high seas.

HISTORY OF THE LEGISLATION.

Section 990 of the Fish and Game Code presently reads as follows:

> "Every person who uses or operates or assists in using or operating any boat, net, trap, line, or other appliance to take fish, mollusks or crustaceans for profit, or who brings or causes fish, mollusks or crustaceans to be brought ashore at any point in the State for the purpose of selling the same in a fresh state, shall procure a commercial fishing license.
>
> A commercial fishing license may be issued to any person other than a person ineligible to citizenship. A commercial fishing license may be

issued to a corporation only if said corporation is authorized to do business in this State, if none of the officers or directors thereof are persons ineligible to citizenship, and if less than the majority of each class of stockholders thereof are persons ineligible to citizenship."

This code section was last amended in 1945. (Stats. 1945, ch. 181, sec. 3.) It should be noted that chapter 181 not only dealt with section 990 of the Fish and Game Code but with sections 427 (hunting licenses) and 428 (sport fishing or angling licenses) as well.[1] The chapter amended each one of these sections, pursuant to which aliens ineligible to citizenship are

[1]Sections 1 and 2 of chapter 181 amended sections 427 and 428 of the Fish and Game Code to read as follows:

427 Class A:

"A hunting license, granting the privilege to take game birds and mammals, shall be issued:

(a) To any citizen of the United States, over the age of 18 years, who is a resident of this State, upon the payment of two dollars ($2).

(b) To any citizen of the United States, under the age of 18 years, who is a resident of this State, upon the payment of one dollar ($1).

(c) To any citizen of the United States, not a resident of this State, upon the payment of ten dollars ($10).

(d) To any person, not a citizen of the United States, who shall have declared his intention to become such citizen according to the law made and provided for such purposes, who is a resident of this State, upon the payment of ten dollars ($10). After such applicant has declared his intention to become a citizen he must complete his naturalization at the earliest period allowed by law. Such applicant shall make and subscribe an oath that he has not claimed his citizenship in a foreign country as a basis for avoiding service in the armed forces of the United States, and the person issuing such license is hereby empowered to administer such oath.

(e) To any person, not a citizen of the United States, upon the payment of twenty-five dollars ($25), except as provided in subdivision (d) of this class; provided, however, that no

denied the privilege of obtaining hunting, sport fishing and commercial fishing licenses.

These three sections of the Fish and Game Code were next last amended in 1943 (Stats. 1943, ch. 1100) when "alien Japanese" were singled out by name as the only persons not qualified for a license to hunt, or fish for profit or pleasure.

Prior to the 1943 amendment all aliens were qualified for such licenses. The hunting license section (427) classified persons under and over the age of 18 years, citizen residents of this State, nonresident citizens, declarant aliens and those who have not declared their intention of becoming citizens. This same classification exists today except that ineligible aliens are denied hunting privileges altogether. Section 428, relating to sport fishing licenses, also classified persons as to age, citizenship and residence in this State.

Section 990 was first enacted in 1933 (Stats. 1933, ch. 73) when the fish and game laws were codified. At the same session of the Legislature, the section was

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such license shall be issued to a person ineligible to citizenship."

428 Class B:

"A sporting fishing license, granting the privilege to take fish for purposes other than profit shall be issued:

(a) To any citizen of the United States, over the age of 18 years, who is a resident of this State, upon the payment of two dollars ($2).

(b) To any citizen of the United States, over the age of 18 years, not a resident of this State, upon the payment of three dollars ($3).

(c) To any person, not a citizen of the United States, and over the age of 18 years, upon the payment of five dollars ($5); provided, however, that no such license shall be issued to a person ineligible to citizenship."

amended (ch. 969) and contained a restriction against persons who had not lived in the United States for one year. Since 1933 section 990 has not been affected by legislation until the amendment in 1943.

QUESTIONS PRESENTED.

1. On the present state of the record, can the petitioner be afforded any relief?

2. Has a state the power to preclude *all* aliens ineligible to citizenship of the United States from hunting or fishing for profit or pleasure?

3. Irrespective of their nationality or race, does section 990 of the Fish and Game Code of California deny ineligible aliens equal protection and due process of law in violation of the Fourteenth Amendment of the Federal Constitution?

ARGUMENT.

I.

ON THE PRESENT STATE OF THE RECORD THE PETITIONER CANNOT BE AFFORDED RELIEF.

Mr. Takahashi comes to this Court with a record which shows that he cannot be afforded relief. The Supreme Court of California properly decided the constitutional questions in accordance with established authorities. But it was unnecessary to do so. The amended judgment is void *ab initio* and the original judgment cannot be satisfied because the

Commission is not empowered to issue licenses to engage in commercial fishing exclusively on the high seas.

The memorandum opinion of the trial Court conceded that a classification of aliens into two groups, namely, those eligible and those ineligible to citizenship of the United States, is proper and within constitutional limits in so far as *fishing in territorial waters is concerned.* It holds, however, that the classification is improper as to "fish caught upon the high seas and outside the territorial jurisdiction of the state." (R. 15-16.) In keeping with its opinion the Commission was ordered to issue to Mr. Takahashi a license permitting him to *engage in commercial fishing upon the high seas only.* It would be impossible for the Fish and Game Commission to comply with such a judgment (R. 7) because the statute does not empower it to issue commercial fishing licenses qualified as to place of use. The statute only permits the Commission to issue licenses to engage in commercial fishing without qualification as to place of use, that is, whether the fishing is done on the high seas, in coastal ocean waters or in inland waters of the State.

The Commission appealed from the original judgment and the appeal divested the trial Court of any further jurisdiction in the case (R. 33); *Linstead v. Superior Court,* 17 Cal. (2d) 9; *Kinard v. Jordan,* 175 Cal. 13.)

After the appeal had been perfected, Mr. Takahashi apparently realized that he had run into a *cul de sac* for he applied ex parte to the trial Court to

amend the original judgment. On his motion the judgment was amended and the Commission was directed to issue a commercial fishing license to him without qualification as to place of use. (R. 21.) However, at that time the trial Court had no jurisdiction of the case and hence its amended judgment is void. (R. 34.)

An appeal was taken from the amended judgment and the Supreme Court of California considered the appeal from the amended judgment on the basis of an order made subsequent to judgment. But that Court need not have done so. A void judgment cannot be vitalized by an affirmance on appeal (*Ball v. Tolman*, 135 Cal. 375; *Pioneer Land Co. v. Maddux*, 109 Cal. 633; *Sullivan v. Gage*, 145 Cal. 759.)

It thus appears that Mr. Takahashi cannot be afforded any relief under the void amended judgment. Moreover, he cannot be afforded relief under the original judgment even if the trial Court is affirmed and the Supreme Court of California is reversed because the Fish and Game Commission is not authorized by statute to issue a license in the form that the original judgment directs, namely, to permit Mr. Takahashi to engage in commercial fishing on the high seas only.

It thus appears that all questions as to the validity or constitutionality of the statute involved are purely hypothetical and abstract.

II.

SECTION 990 OF THE FISH AND GAME CODE OF CALIFORNIA DOES NOT DENY EQUAL PROTECTION OF LAWS TO ALIENS INELIGIBLE TO CITIZENSHIP NOR DOES IT DIVEST THEM OF PROPERTY WITHOUT DUE PROCESS OF LAW.

(a) No property rights are involved in this case. Fishing for pleasure or profit is a privilege—not a right.

Perhaps the most startling thing about Mr. Takahashi's petition is the fact that not one case involving fish or game law is cited in support of his principal contention that section 990 violates the equal protection and due process clauses of the Federal Constitution. All of his cases are not germane and are distinguishable on the facts.

It has long been recognized not only in California but throughout the United States that free swimming fish, like game, are classed as animals *ferae naturae*. (*In re Parra*, 24 Cal. App. 339; *People v. Monterey Fish Products Company*, 195 Cal. 548; *Bayside Fish Flour Company v. Gentry*, 297 U. S. 422) and, until reduced to actual possession, are the property of the state in its sovereign capacity as trustee for all its people. (*Bayside Fish Flour Company v. Zellerbach*, 124 Cal. App. 564; *People v. Monterey Fish Products Company*, 195 Cal. 548; *Pacific Gas and Electric Company v. Moore*, 37 Cal. App. (2d) 91; *People v. Hovden Company*, 215 Cal. 54.) If fish are reduced to possession in violation of law, the possessor does not acquire title thereto. (*Suttori v. Peckham*, 48 Cal. App. 88; *People v. Monterey Fish Products Company*, 195 Cal. 548.)

It follows that an individual cannot obtain an absolute property right in fish or game except upon such conditions, restrictions and limitation as the State may impose. Because the State has power to alienate fish or game on such terms as it sees fit, whatever interests a person has attach only as a matter of *privilege; not, as a matter of right.* (*Geer v. Connecticut,* 161 U. S. 519; *Ex parte Maier,* 103 Cal. 476; *Kellogg v. King,* 114 Cal. 378; *People v. Truckee Lumber Company,* 116 Cal. 397; *Ex parte Kenneke,* 136 Cal. 527; *In re Phoedovius,* 177 Cal. 238; *Paladini v. Superior Court,* 178 Cal. 369; *State v. Monteleone,* 131 S. 291, 171 La. 437.) It has also been stated that, as no absolute property right is acquired in fish or game, any restrictions placed on the taking thereof deprive no person of a property right which is within the protection of the Constitution. (*Shouse v. Moore,* 11 F. Supp. 784; *People v. Clair,* 116 N. E. 868, 221 N. Y. 108; see also *In re Phoedovius,* 177 Cal. 238.) Hence when applied to the regulation of fish and game, due process and equal protection of laws depend on the same principles. (*Shouse v. Moore,* 11 F. Supp. 784; *Thomason v. Dana,* 52 Fed. (2d) 759; aff. 285 U. S. 529.)

(b) Equal protection of laws is not denied where the State confers exclusive privileges of hunting and fishing.

Since fish are owned by the State and may become the subject of private ownership only in a qualified way, the legislature may adopt such laws for the protection of fish as it deems proper, subject to constitutional provisions against discrimination. (*Bayside*

Fish Flour Co. v. Gentry, 297 U. S. 422; *Skiriotes v. Florida*, 313 U. S. 69; *In re Phoedovius*, 177 Cal. 238; *Ex parte Makings*, 200 Cal. 474; *In re Florence*, 10 Cal. App. 607; *Svenson v. Engelke*, 211 Cal. 500; *Ex parte Vitalie*, 117 Cal. App. 553; *Santa Cruz Oil Corp. v. Milnor*, 55 Cal. App. (2d) 56; see also Sec. 25½, Art. IV, Constitution of California.) This has also been held to be a valid exercise of the police power. (*Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422; *Lawton v. Steele*, 152 U. S. 133; *Manchester v. Massachusetts*, 139 U. S. 240; *Paladini v. Superior Court*, 178 Cal. 369; *Geer v. Connecticut*, 161 U. S. 519; *People v. Stafford Packing Co.*, 139 Cal. 719.)

The power to regulate fish and game includes the power to require fishermen to obtain licenses and to pay fees therefor. (*In re Parra*, 24 Cal. App. 339; 22 Amer. Jur. 701, Sec. 46.) Licenses to take fish and game are a mere privilege. They are subject to all statutory requirements and may be taken away by the State in the exercise of its police power. (*Paladini v. Superior Court*, 178 Cal. 369; *State v. Bennett*, 288 S. W. (Mo.) 50.)

The State may confer exclusive rights of fishing and hunting on its own citizens and expressly exclude aliens and nonresident citizens without violating constitutional restraints. This rule is well established throughout the United States. (*State v. Gallop*, 126 N. C. 790, 35 S. E. 180; *In re Eberle*, 98 Fed. 295; *People v. Cummings*, 211 Ill. 392, 71 N. E. 1031; *McCready v. Virginia*, 94 U. S. [illegible]; *Commonwealth v. Hilton*, 174 Mass. 29, 54 N. E. 362; *State v. Kofines*,

33 R. I. 211, 80 Atl. 432; *People v. Setunsky*, 161 Mich. 624, 126 N. W. 844; *Haavik v. Alaska Packers Association*, 263 U. S. 510; *State v. Leavitt*, 105 Me. 76, 72 Atl. 875; *People v. Brennan*, 255 N. Y. S. 331; *Territory v. Takanabe*, 28 Haw. 43 (aliens); *State v. McCullagh*, 96 Kan. 786, 153 Pac. 557; *State v. Niles*, 78 Vt. 266, 62 Atl. 795; *Patsone v. Pennsylvania*, 232 U. S. 138 (aliens); *LaCoste v. Department of Conservation*, 151 La. 909, 92 So. 381 (affirmed 263 U. S. 545); *State v. Catholic*, 75 Ore. 367, 147 Pac. 372; *Silver v. State*, 147 Ga. 162, 93 S. E. 145 (aliens); *Alsos v. Kendall*, 111 Ore. 359, 227 Pac. 286 (aliens); *State v. Maybury*, 136 Wash. 210, 239 Pac. 552 (aliens); 12 Corpus Jur. 119.)

The point is well covered in *Lubetich v. Pollack*, 6 Fed. (2d) 637. The question in that case was the validity of a Washington law which limited fishing privileges to citizens and *declarant aliens*. Please note that ineligible aliens were thus excluded. Certain residence requirements were also imposed. In sustaining the constitutionality of the statute the Court said (pages 638, et seq.):

> "It cannot be doubted that the clause of the Fourteenth Amendment guaranteeing equal protection of the laws is of universal application to all persons within the territorial jurisdiction involved, and includes within its protection aliens, without regard to race, color, or nationality. The first question for decision, therefore, is: Does the statute under review amount to a denial of such equal protection? The whole question of the ownership of fish and game and the nature of the

title thereto is exhaustively considered by the Supreme Court in the case of *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793. In that case the Court had under consideration a statute of Connecticut which made it unlawful to kill any woodcock, ruffled grouse, or quail for the purpose of conveying the same beyond the limits of the state. Both the civil and common law authorities were elaborately reviewed, and in the course of the opinion Mr. Justice White declared that from the earliest traditions the right to reduce animals ferae naturae to possession has been subject to the control of the law giving power; that the wild game within a state belongs to the people in their collective sovereign capacity; that it is not the subject of private ownership except in so far as the people may choose to make it so, and they may, if they see fit, absolutely prohibit the taking of it or the traffic or commerce in it.

* * * * * * *

Obviously it is a denial of the equal protection of the laws when a lawmaking body, regulating, *not its own property, but private business*, undertakes to deny to aliens the right to engage in lawful trade or labor; but *it is difficult to comprehend how there can be any such violation when the government, in its capacity of owner and proprietor of property, refuses to allow an alien the right to share therein on equal terms with those for whom the property involved is held in sovereign trust.* In such circumstances aliens are denied participation in the property, for the simple reason that they do not own it, either in whole or in part, and in consequence have no right to share its enjoyment." (Italics added.)

In *People v. Magner*, 97 Ill. 320, at page 333 the Court said:

> "The ownership being in the people of the state, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game, or qualify or restrict, as in the opinion of its members will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege, granted, either expressly or impliedly, by the sovereign authority—not a right inherent in each individual; and, consequently, nothing is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the state, and hence by implication it is the duty of the Legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the state. But in any view, the question of individual enjoyment is one of public policy and not of private right."

McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248, involved a statute of Virginia which prohibited persons who are citizens of that state from planting oysters or shellfish in certain tidewaters. It was held that the statute did not violate the Fourteenth Amendment of the Federal Constitution. This Court said (page 394):

"The principle has long been settled in this court that each state owns the beds of all tidewaters within its jurisdiction, unless they have been granted away * * * In like manner, the states own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running, For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty * * * The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state which has consequently the right, in its discretion, to appropriate its tidewaters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship * * * And as all concede that a state may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone."

In *Patsone v. Pennsylvania*, 232 U. S. 138, 34 S. Ct. 281, 58 L. Ed. 539, the Court had under consideration

a statute of Pennsylvania making it unlawful for an unnaturalized, foreign-born, resident to kill any wild bird or animal, except in defense of person or property and to that end made it unlawful for such a person to own or be possessed of a shotgun or rifle. The constitutionality of that statute was challenged as being violative of the Fourteenth Amendment. Citing *Geer v. Connecticut*, 161 U. S. 519 this Court said:

> "It is to be remembered that the subject of this whole discussion is wild game, which the state may preserve for its own citizens if it pleases." (Page 145.)

It has also been held that statutes which impose a greater license fee to take fish or game on one group of persons than on others are not unconstitutional. (*People v. Cummings*, 211 Ill. 392, 71 N. E. 1031; *People v. Setunsky*, 161 Mich. 624, 126 N. W. 844; *LaCoste v. Department of Conservation*, 151 La. 990, 92 So. 381 (affirmed 263 U. S. 545); *Bondi v. McKay* (Vt.), 89 Atl. 228; *Allen v. Wyckoff* (N. J.), 2 Atl. 659; see also 61 A. L. R. 338, 112 A. L. R. 63.)

In other matters of public concern aliens have constitutionally been barred from participation. Thus it is no denial of equal protection or due process of law to preclude aliens from obtaining an "on sale distilled spirits license" (*Tokaji v. State Board of Equalization*, 20 Cal. App. (2d) 612); to prevent an alien from conducting a pool or billiard parlor (*Ohio v. Deckebach*, 274 U. S. 392); from engaging in the business of pharmacy (*Sashihara v. Board of Pharmacy*, 7 Cal. App. (2d) 563); from practicing law (*In re Yama-*

shild, 30 Wash. 234, 70 Pac. 482; *Large v. The State Bar*, 218 Cal. 334); from possessing concealed weapons (*People v. Cordero*, 50 Cal. App. 146), and from being licensed as an auctioneer (*Wright v. May*, 127 Minn. 150, 149 N. W. 9.) In each of these instances the right to carry on such businesses or do such things was accorded to the citizen. Many other examples might be cited but these few illustrate the general rule.

III.

COMMERCIAL FISHING IS AN OCCUPATION WHICH IS NOT OPEN TO AN ALIEN AGAINST THE LEGISLATIVE WILL OF THE STATE.

The petitioner and, indeed, the minority of the Supreme Court of California place great reliance upon *Truax v. Raich*, 239 U. S. 33. This case is quoted at length to support the contention that the right to work for a living in the common occupations of the community is open to all and may not be denied. However, to our minds, the minority opinion of the Supreme Court of California omits the most important part of *Truax v. Raich* from its lengthy quotation. (R. 46 fol. 98.) We supply the deficiency here by quoting the important part of *Truax v. Raich* which the minority opinion omits, viz:

> "The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, *or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as*

against both aliens and the citizens of other States. Thus in McCready v. Virginia, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the State, and an analogous principle was involved in Patsone v. Pennsylvania, 232 U. S. 138, 145, 146 where the discrimination against aliens upheld by the Court had for its object the protection of wild game within the States with respect to which it was said that the State could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (Hauenstein v. Lynham, 100 U. S. 483; Blythe v. Hinckley, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise." (Italics added.)

It requires no lengthy argument to show that the facts pertaining to Mr. Truax (a cook) are entirely different from those pertaining to Mr. Takahashi (a former commercial fisherman). The latter does not have the right to choose fishing as an occupation since the State may, if it desires, preclude fishing entirely. This is demonstrated by the case of *Alsos v. Kendall,* 111 Ore. 359, 227 Pac. 286. In that case the Court said (at page 290):

"The rights of the state in the fish and in the waters from which the fish are to be taken are

superior to plaintiff's right to choose fishing for salmon in those waters for an occupation. Such an occupation is not open to an alien against the legislative will of the state, since it involves the appropriation of property belonging to the state in its sovereign capacity. The state, in prohibiting aliens from engaging in the taking of salmon fish, is dealing with the common property of the people of the state; in prohibiting citizens of other states and unnaturalized foreign-born residents from fishing in the public waters of the state the state is, in fact, dealing with a property right of the state, and not with a mere privilege or immunity of a citizen of another state, nor does it amount to a denial to an alien within the state of the equal protection of its laws."

In the *Alsos* case the Court concluded that the Oregon statute which prohibited an alien from accepting employment from one lawfully engaged in fishing and thereby preventing him from earning a livelihood in that particular field did not render the statute unconstitutional. The reasoning of the Oregon Court was followed in *Lubetich v. Pollack*, 6 Fed. (2d) 237, in *Curry v. Moran*, 76 Fla. 373, 79 So. 637, and *Haavick v. Alaska Packers' Association*, 263 U. S. 510, 68 L. Ed. 414.

IV.

ELIGIBILITY TO CITIZENSHIP FURNISHES A REASONABLE BASIS FOR CLASSIFICATION.

It has been shown that a State may make a valid classification between citizens and aliens with respect to the privilege of hunting or fishing for pleasure or profit. It has also been shown that a State may likewise classify citizens of the United States, that is, residents of the State and non-residents, with respect to the privilege of hunting or fishing for pleasure or profit. This brings us to the next question as to whether the State may classify aliens into two groups, viz: (1) those who are eligible to citizenship and (2) those who are not. That is all the legislature has done by the 1945 amendment, chapter 181 to sections 990, 427 and 428 of the Fish and Game Code. *Terrace v. Thompson*, 263 U. S. 197 seems to answer this question at page 220 where it said:

> "The State (of Washington) properly may assume that the considerations upon which Congress made such classification (between eligible and ineligible aliens) are substantial and reasonable * * * Two classes of aliens inevitably result from the naturalization laws, — those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act." (Parentheses supplied.)

The basis for classification between eligible and ineligible aliens seems to have greater force and logic

in its application to the case at bar than it did to the alien land law cases for these reasons:

1. *private* property rights of the individual are not involved here as they were in the alien land law cases;

2. *public* property rights are at issue here and were not involved in the other cases;

3. *individual privilege* alone is at issue here, the taking of fish being a privilege and not a right;

4. if a state may properly concern itself with the type of people who may possess its lands, it may also exercise similar concern as to those who take its property, namely, fish and game.

It is suggested by Mr. Takahashi that the reduction in the number of persons who may fish does not have a reasonable relation to the objects of conservation and hence such reduction in the number of persons is not within the police power of the State (petition, page 9). This is hardly correct. The language of chapter 181 (amending sections 990, 427 and 428 of the Fish and Game Code) is clear and unequivocal. By the amendment the number of persons eligible to hunt or fish for pleasure or profit was reduced. On its face this is a conservation measure because, by limiting the number of eligible persons to hunt or fish, more fish and game will be conserved.

Man is the greatest and most destructive of all fish and game predators. Therefore it is inescapable that when the State denies hunting and fishing privi-

leges to a particular group, such as ineligible aliens fish and game are thus conserved. Obviously if some reduction in the number of persons eligible to hunt and fish is found necessary it is logical and fair that the first group to be denied the privilege should be the aliens ineligible to citizenship. They never can become a part of the State, and hence there is no reason why they should not be the first to be excluded from the enjoyment of the State's resources of wildlife. If a further reduction is necessary the next group to be denied the privilege would normally be eligible aliens, then nonresident citizens and finally, if full protection is needed, citizen residents of the State themselves.

It is evident that by the 1945 amendment the legislature took the greater step in the conservation of the State's resources than it did in 1943 because California is populated by more ineligible aliens than persons of Japanese ancestry. (Cf. Sixteenth Census of the United States.)

This reduction of the number of persons eligible to hunt and fish bears a reasonable relation to the object of conservation of fish and game and is within the purview of the State's police powers. Hence the 1945 amendment cannot be declared invalid because a court may regard it ineffectual, harsh or even as an aid to an objectionable policy (cf. *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422).

The consequences of the fishing activities of one commercial fisherman alone are brought to light by reference to the complaint and supplemental com-

plaint in a case companion and incidental to Mr. Takahashi's. This case is entitled *Tsuchiyama v. Fish and Game Commission*[2]. From the pleading of the *Tsuchiyama* case it may be inferred that one commercial fisherman alone may expect to take in one season fish valued at $10,000. This sum is the measure of the actual damages claimed by virtue of the fact that Mr. Tsuchiyama was not permitted to engage in fishing for one season. Assuming for illustration that one-half of this sum represents tuna and albacore (cf. R. 19) and the other one-half represents sardines, the sum is comparable to 34,000 pounds of tuna and albacore and 500,000 pounds of sardines at prices current as of the date when the suit was filed, namely, August 5, 1946. Consequently, a large number of fish are conserved by the elimination of just one commercial fisherman. Multiply that amount by the 200 fishermen in whose behalf Mr. Tsuchiyama sued, or by the total number of ineligible aliens throughout California, and it is apparent at once that the denial of fishing privileges to ineligible aliens has greatly conserved California's fast dwindling fish supply.

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[2]This case is number 517,578 in the Superior Court of the State of California, in and for the County of Los Angeles, and number L.A. 19,880 in the Supreme Court of the State of California. Counsel for Mr. Tsuchiyama and counsel in the case at bar are identical for all practical purposes. The *Tsuchiyama* case sought to enjoin the Fish and Game Commission from interfering with the commercial fishing activities of Mr. Tsuchiyama on the ground that section 990 of the Fish and Game Code is unconstitutional. Mr. Tsuchiyama prayed for $10,000 actual damages for loss of profit he might have made during the fishing season. In addition to himself Mr. Tsuchiyama questioned the constitutionality of section 990 in behalf of 200 other alien Japanese fishermen.

The rationale of California's action in eliminating ineligible aliens from the privilege of engaging in commercial fishing is all the more apparent from the fact that the sardine fishery of California has practically become extinct from over fishing. Practically all of the sardine fish boats operating out of San Francisco and Monterey have moved to southern California waters and the sardine fishery is being over-fished and threatened with extinction.

If a state of facts can reasonably be conceived to sustain a law which is challenged as being unconstitutional on the theory of denial of equal protection the statute will be upheld (*Ferrante v. Fish and Game Commission*, 29 A. C. 363, 369).

Courts are limited in their power to strike down classifications made for the purpose of regulation. This Court has laid down the rules or limitations in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61. At pages 78 and 79 it is said:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in ques-

> tion, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Moreover, in *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, this Court recognized the difficulty of stating a rule of classifications. It stated at page 429:

> "It has never been found possible to lay down any infallible or all-inclusive test by the application of which it may be determined whether a given difference between the subjects of legislation is enough to justify the subjection of one and not the other to a particular form of disadvantage. A very large number of decisions have dealt with the matter; and the nearest approach to a definite rule which can be extracted from them is that, while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some reasonable relation to the object of the legislation."

V.

THE INHERENT POWER OF THE STATE TO REGULATE ITS FISHERY RESOURCES APPLIES TO FISH BROUGHT INTO THE STATE FROM THE HIGH SEAS.

At page 9 of his petition Mr. Takahashi indicates that he is again concerned only with fishing upon the high seas and has forgotten about his claim to the right to fish in territorial waters. He states:

> "The question remains whether the State may single out aliens from bringing into California for sale fish caught on the high seas outside its own territories."

And at page 10 he indicates that eligible aliens "make their living fishing on the high seas" and that only the ineligible aliens are denied this privilege.

Both Mr. Takahashi and the trial Court overlook the rule of law that the State has power to regulate with respect to fish brought ashore from the high seas. This rule has been iterated and reiterated, notably in the cases of *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422; *Johnson v. Gentry*, 220 Cal. 231; *Van Camp Sea Food Co. v. Department of Natural Resources*, 30 Fed. (2d) 111; *Silz v. Hesterberg*, 211 U. S. 31; *Ex parte Maier*, 103 Cal. 476; *In re Delininger*, 108 Fed. 623; *Union Fisherman etc. Co. v. Schoemaker*, 98 Ore. 659, 193 Pac. 474; *Pacific Steam Whaling Co. v. Alaska Packers Assn.*, 138 Cal. 632; *Svenson v. Engelke*, 211 Cal. 500).

The reason for this rule is ably stated in the leading case of *Ex parte Maier*, 103 Cal. 476, at page 480, viz.:

> "The facility and ease with which the statutes for the protection of game have been evaded in the past is a matter of common knowledge. Deer and other game have been slaughtered during the closed season and foisted upon the market as game procured without the state, and owing to the practical impossibility in the great majority of cases of proving with certainty the source from

which it was procured, the attempted enforcement of the statutes for its protection has largely proven abortive."

Further support is found for this contention by reference to Section 1110 of the Fish and Game Code.[3] In general it provides that no person shall use a boat in territorial waters that delivers to any point outside of the State fish caught either in territorial waters or on the high seas without permission of the Fish and Game Commission. The constitutionality of this section has been upheld in *Santa Cruz Oil Corp. v. Milnor*, 55 Cal. App. (2d) 56, and *Mirkovich v. Milnor*, 34 Fed. Supp. 409. Of interest here is some of the language of the Court in the former case where, at page 61, it is said:

"The lawful act of fishing outside the three mile limit obviously affects the natural resources of this state within the three mile limit. California has no power to extend the operation of its laws beyond its maritime frontier, but when the impact of activities outside the three mile limit necessarily adversely affects the public policy of this state, within the three mile limit, the state has the power to take steps against the

[3]The pertinent portion of section 1110 reads as follows:
"No person shall use or operate or assist in using or operating in this State or the waters thereof, any boat or vessel used in connection with fishing operations irrespective of its home port or port of registration, which fishing boat or vessel delivers or by which there is delivered to any point or place other than within this State any fish, mollusks or crustaceans which are caught in, or taken aboard said boat or vessel from, the waters of the Pacific Ocean within this State or on the high seas or elsewhere, unless a permit authorizing the same shall have been issued by the Fish and Game Commission."

persons responsible for such activities when they come within the limits of its jurisdction."

Applying this rule to the case at bar, it would seem that if California has constitutional power to preclude ineligible aliens from fishing in state waters (as the opinion of the trial Court in the case at bar infers), then California may extend that prohibition to the fishing activities of ineligible aliens on the high seas, particularly when the catch is made the subject of commerce in this State.

VI.

SECTION 990 OF THE FISH AND GAME CODE IS NOT ANTI-JAPANESE AND RACIAL IN PURPOSE.

It is well recognized that all presumptions and intendments favor the constitutionality of statutes. All doubts are to be resolved in favor of validity, and before an act may be declared invalid its conflict with the constitution must be clear, positive, abrupt and unquestionable. (*Pacific Gas and Electric Co. v. Moore*, 37 Cal. App. (2d) 91; *Rainey v. Michel*, 6 Cal. (2d) 259.) Quoting from 11 American Jurisprudence, page 725, the Court in *Pacific Gas and Electric Co. v. Moore*, 37 Cal. App. (2d) 91, said:

"It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it * * * Thus,

if the proper construction of a statute is doubtful, the doubt must be resolved in favor of the law." (p. 94.)

The burden of overcoming such presumptions and intendments is cast upon the assailant; in this case, upon Mr. Takahashi. (5 Cal. Jur. 632.) In considering the constitutionality of a statute, the Court must limit itself to the facts as they appear on the *face of the enactment* and not go behind the statute and receive evidence from outside sources which would tend to impeach or overthrow the law. (*Los Angeles etc. District v. Hamilton*, 177 Cal. 119; *Galeener v. Honeycutt*, 173 Cal. 100; *Ojai v. Chaffee*, 60 Cal. App. (2d) 54.)

In enacting a law, the intent of the legislature is to be determined from what it *did*, that is, from the language of the statute itself unless that language is ambiguous. (*In re Monrovia Evening Post*, 199 Cal. 263; *Taylor v. Lundblade*, 43 Cal. App. (2d) 638.) Aside from the language of the statute, *no showing can be made as to legislative intent or object, and the opinions of members of the legislative body are not admissible to show what was intended or meant by the enactment.* (*Davies v. City of Los Angeles*, 86 Cal. 37; *Ex parte Goodrich*, 160 Cal. 410; *Leese v. Clark*, 20 Cal. 387; *In re Lavine*, 2 Cal. (2d) 324.)

Racism has no part in this case or at least should have none. But throughout the entire history of this case Mr. Takahashi has endeavored to inject the issue of racism and to throw a red-herring across the

path of the courts. He contends that section 990 of the Fish and Game Code is aimed at a single racial group, namely Japanese. Actually, of course, such is not true. The statute precludes *all persons* ineligible to citizenship from hunting and from fishing for profit or pleasure. (Stats. 1945, chapter 181.) All of the races ineligible to citizenship are included, and no one group in particular (such as Japanese) is singled out.

Let us assume for argument's sake that instead of Mr. Takahashi a Malayan had instituted a proceeding similar to the one at bar. He is as much entitled to challenge the constitutionality of section 990 as Mr. Takahashi and to contend that California is not empowered to deny ineligible aliens the privilege of hunting and fishing. It makes no difference whether he had ever engaged in the business of fishing in the past. He still may *assert his claim to enjoy the privilege* just as Mr. Takahashi has done. However, if this proceeding had been instituted by a Malayan, all discussion and argument anent the 1943 amendment (chapter 1100) barring alien Japanese and its effect on the existing statute would be irrelevant. Can it be contended by all persons ineligible to citizenship (other than natives of Japan) that the 1943 amendment was aimed at them and that the 1945 amendment continued to single them out by "description rather than by name"? Obviously they could not do so. All reference to Japanese, to the Report of the Senate Fact-finding Committee on Japanese Resettlement, and to the question of whether Japanese were the only ineligible aliens who fished commercially in the waters

bordering California would be beside the point and irrelevant. The only question would be whether California may preclude persons ineligible to citizenship from fishing and hunting. That should be the issue here, the nationality of the petitioner being only a coincidence.

Mr. Takahashi alleges in his original bill of complaint, as indicated above, that section 990 is unconstitutional "because enacted for the purpose and administered in a manner to discriminate against persons, including the petitioner, solely because of his race." (R. 2-3.) This was denied by the Fish and Game Commission. No proof was offered by respondent in support of his allegation and hence *the allegations of the answer must be taken as true.* (*McClatchy v. Matthews,* 135 Cal. 274; *Vanderbush v. Board of Public Works,* 62 Cal. App. 771; *Donohue Co. v. Superior Court,* 79 Cal. App. 41; *Brown v. Superior Court,* 10 Cal. App. (2d) 365.)

As no evidence was offered to support the allegation that section 990 is unconstitutional because "enacted" for the purpose and "administered" in a manner to discriminate against petitioner because of his race, the language of the statute alone furnishes the only indication of legislative intent and the denial of such allegations by the answer must be taken as true. Whatever imaginary doubts or fears that may arise from a consideration of the 1945 amendment (ineligibles) in the light of the 1943 amendment (alien Japanese) must be resolved in favor of the validity of the last legislative expression,

and it must be presumed that the California legislature intended, by a reduction of the number of persons eligible to hunt and fish, to conserve thereby the State's natural resources of fish and game.

Nor does the statement contained in the Report of the Senate Fact-Finding Committee on Japanese Resettlement of May 1, 1945 (see page 13 of Mr. Takahashi's petition) supply any criterion of legislative intent. That report represents the opinion of *only five* members of the California Senate; it does not speak for all other members of the Senate or for the members of the other branch of the legislature, that is, the Assembly. *The report was not offered or received in evidence in this case.* It could not have been so received. Moreover, examination of the report reveals it dealt primarily with the alien land laws and the Tule Lake riot. Japanese fishing boats, Japanese language schools and dual citizenship appear only as matters of minor concern. As shown hereinabove the opinions of members of the legislative body are not admissible to show what was intended or meant by the enactment. Assuming for the sake of argument only that the legislature intended by the 1945 amendment to continue an exclusive ban on alien Japanese by description rather than by name, nevertheless such a motive is not subject to judicial inquiry. (5 Cal. Jur. 640, sec. 66.) To the contrary, however, the history of the 1945 and 1943 legislation shows a desire to avoid the possibility of racial discrimination by extending the prohibition against fishing and hunting to all persons within a given class.

The constitutionality of the 1943 amendment is not at issue in this case. If the issue had ever been presented to a Court, undoubtedly it would have been considered in the light of *Korematsu v. United States*, 323 U. S. 214, 216, wherein it was said that while "legal restrictions which curtail the civil rights of a single racial group are immediately suspect", nevertheless, "pressing public necessity may sometimes justify the existence of such regulations".

One thing that stands out preeminently in this case is a disposition on the part of Mr. Takahashi, after the hearing in the trial Court, to try to find factual support for the judicial knowledge which the trial Court erroneously assumed in its memorandum opinion that "Japanese were the *only* aliens ineligible to citizenship who engaged in commercial fishing in ocean waters bordering on California" (R. 17) (emphasis added) and when the trial Court also imputed such knowledge to the California legislators of 1945.

Fish Bulletin No. 49 of the Bureau of Commercial Fisheries of California to which Mr. Takahashi has referred at page 14 of his petition does not help him. The record of this case shows that the Fish and Game Commission has no statistics with respect to the eligibility to citizenship of persons who fish commercially. The statistics and data of the Fish and Game Commission relate to nativity alone. Herein perhaps lies the principal point which Mr. Takahashi overlooks. In short, nativity does not determine eligibility to citizenship. Eligibility to citizenship is determined by race. (The Nationality Act of 1940, section 302 et

seq., 54 Stat., pages 1137, 1140.) Thus, a Malayan, for example, may show British nativity and yet be ineligible to citizenship. This is shown by the answer of Miss Geraldine Connor to question No. 9 (R. 27-28.) Moreover, it should be borne in mind that all Orientals are not ineligible to citizenship. Chinese have been eligible since December 17, 1943. (57 Stat. 601.) Persons of races indigenous to India are eligible. (Public Law 483, 79th Congress, 2nd Session.) And, for that matter, alien Japanese who served in World War II have been eligible to citizenship from December 7, 1941 to June 30, 1946. (56 Stat. 182, 187; 58 Stat. 827; 59 Stat. 658.) This period includes 1943 and 1945 when the amendments to sections 990, 427 and 428 of the Fish and Game Code were made.

Mr. Takahashi concedes that there are ineligible alien commercial fishermen besides Japanese. He does not know how many, but he says the number is inconsequential. The Fish and Game Commission does not know the number nor does the trial Court. However, the decision of the trial Court was not based on an inconsequential number but rather on the ground that the Japanese were the *only* ineligible aliens who engaged in commercial fishing. Assuming for argument's sake only that the number of ineligible alien fishermen is small, the consequences of such a number of fishermen was not raised by Mr. Takahashi in the trial Court and has no place in this case for the first time on appeal.

VII.

SECTION 990 OF THE FISH AND GAME CODE DOES NOT CONFLICT WITH ANY FEDERAL AUTHORITY OR POLICY WITH RESPECT TO FISHING ON THE HIGH SEAS OR COASTAL WATERS. NO SUCH FEDERAL AUTHORITY HAS BEEN ASSERTED.

Mr. Takahashi takes the position for the first time that the so-called tidelands case, *United States v. California*, 332 U. S. 19, divests California of jurisdiction to regulate the taking of fish in its coastal waters or the landing of fish within its territorial limits which are taken on the high seas.

This is a peculiar position for Mr. Takahashi to take because he seeks from California a license to engage in commercial fishing in such waters. In other words, if he assumes that section 990 of the Fish and Game Code has no validity because the Federal Government has occupied the field of fishery on the high seas and coastal waters, then why does he need a license from California? It is our contention, however, that *United States v. California*, supra, has no application whatever to the case at bar. That case was considered in *Toomer v. Witsell*, 73 Fed. Supp. 371, by a Federal District Court of three judges in South Carolina and was held not to affect the fishery. A three judge District Court in California similarly held in *Northern California Fisheries Association v. Fish and Game Commission*, No. 27,821-G, Northern District of California, Southern Division.

The tidelands case was decided in June of 1947. Subsequently the Congress of the United States

clearly indicated that the Federal Government does not intend to attempt to regulate the Pacific Coast fisheries. On July 24, 1947 (subsequent to the tidelands case) the President approved H. R. 3598 (also known as Public Law 232—80th Congress, Chapter 316—1st Session) pursuant to which consent and approval of Congress is given to an interstate compact between the states of Washington, Oregon and California creating a Pacific Marine Fisheries Commission. A portion of Article IV of that compact is of interest here. It reads:

> "To that end the commission shall draft and, after consultation with the advisory committee hereinafter authorized, recommend to the governors and legislative branches of the various signatory states hereto legislation dealing with the conservation of the marine, shell and anadromous fisheries in all of those areas of the Pacific Ocean over which the states of California, Oregon and Washington jointly or separately now have or may hereafter acquire jurisdiction. The commission shall, more than one month prior to any regular meeting of the legislative branch in any state signatory hereto, present to the governor of such state its recommendations relating to enactments by the legislative branch of that state in furthering the intents and purposes of this compact."

The Presidential Proclamation of September 28, 1945 does not in any way interfere with the right of the State to control its fishery resources. Neither Congress nor the Executive Branch of the Federal Gov-

ernment have manifested any interest therein. And, as indicated above, approval by the Federal Government of the pact between the three Pacific Coast States shows an inclination in just the opposite direction.

However, the fact that the United States has not occupied the field of regulating the fisheries in coastal waters, does not mean that it has the right to do so unless some Federal interest attached which would be held superior to the right of the State to regulate its own fisheries. Some cases, such as *Skiriotes v. Florida*, 313 U. S. 69, indicate that in the absence of an assertion of any right of control over the fishery by the Federal Government, the States may occupy the field. In all such cases, however, the language used appears to be pure dictum. It occurs to us that the better rule is announced in *Bayside Fish Co. v. Gentry*, 297 U. S. 422, to the effect that the States have supreme power and control over the fish and fisheries bordering their coasts.

In raising the point that section 990 of the Fish and Game Code conflicts with Federal policy with respect to fisheries on the high seas and coastal waters, Mr. Takahashi also overlooks the fact that a large amount of California fishing is carried on in inland waters, for example, the waters of San Francisco Bay, the Sacramento-San Joaquin River system and elsewhere throughout the State. Apparently he contends that he does not need a commercial fishing license to fish on the high seas and in coastal waters; although

he must concede, by failing to refer thereto, that he does need such a license to fish in inland waters of the State. If that is true, then Mr. Takahashi's position becomes all the more complex.

CONCLUSION.

For the reasons hereinabove set forth, it is respectfully submitted that the petition of Mr. Takahashi for a writ of certiorari should be denied.

Dated, San Francisco, California,
February 17, 1948.

Respectfully submitted,

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